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IN THE
Supreme Court of the United States

October Term, 1964
No. 42

MORTIMER SINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinion Below.

There was no opinion in the District Court. The opinion of the United States Court of Appeals for the Ninth Circuit [R. 23] is reported as *Singer v. United States* at 326 F. 2d 132 (C. A. 9, 1964).

Jurisdiction.

The Opinion and the Judgment of the United States Court of Appeals for the Ninth Circuit in this action were entered on January 6, 1964 [R. 23, 28]. A petition for rehearing was denied on February 10, 1964 [R. 28]. The petition for a Writ of Certiorari herein was filed on March 6, 1964. The Petition was granted by Order of this Court Allowing Certiorari dated April 20, 1964 [R. 104]. The jurisdiction of this Court is based on 28 U. S. C. Section 1254(1).

Questions Presented.

1. May the United States of America constitutionally compel the defendant in a felony case to be tried by a jury against his will and against the will of his counsel when the trial judge has expressed his approval of their valid waiver of a jury trial, but the Government refused to consent thereto?

2. Is Rule 23(a) of the Federal Rules of Criminal Procedure constitutionally valid insofar as it limits the right of the defendant to waive a jury trial by requiring the consent of the Government thereto?

3. Did the failure of the trial court to charge the jury on the elements of the offense charged, combined with the other errors in its charge to the jury, constitute a violation of the due process clause of the United States Constitution so that petitioner was denied a fair trial?

4. Did the improper and prejudicial statements and arguments made by the prosecutor constitute a violation of the due process clause of the Constitution so that petitioner was denied a fair trial?

5. Did the Circuit Court err in failing to apply Rule 52(b) of the Federal Rules of Criminal Procedure in order to correct the manifest and seriously prejudicial errors which occurred at the trial even though they were not called to the attention of the trial court?

Constitutional Provisions, Statutes, and Rules of Court Involved.

The United States constitutional provisions involved include the Fifth, Sixth, Ninth and Tenth Amendments which are set forth in Appendix A (*infra*) page 1. The provisions of Rule 23(a), Rule 30, and Rule 52(b) of the Federal Rules of Criminal Procedure are set forth in Appendix B (*infra*), pages 2 and 3. The provisions of 18 U. S. C. Section 1341, known as the Mail Fraud Statute, are set forth in Appendix C (*infra*) page 4.

Statement of the Case.

Petitioner, Mortimer Singer, was tried and convicted by a jury in the United States District Court, Southern District of California, on twenty-nine counts of an indictment [R. 1] charging thirty separate violations of the Mail Fraud Statute, 18 U. S. C. Section 1341 (Appendix C, page 4).

Counts One to Seventeen of the indictment charged "depositing" of mail in violation of Title 18 U. S. C. Section 1341, and Counts Eighteen to Thirty charged "receiving" mail in violation of the same statute [R. 1-17]. The first count of the indictment set forth the nature of the alleged scheme and the remaining counts incorporated the details thereof by reference to Count One. The indictment charged that beginning on or about July 1, 1957 and continuing to on or about March 15, 1959 appellant devised a scheme to defraud and obtain money and property from amateur song writers, lyric writers, and composers, by means of false and fraudulent pretenses, representations and promises. The indictment further alleged that petitioner falsely represented himself as the operator of a

legitimate and well-established song servicing and marketing business which would, in return for a service charge, be able to have songs, lyrics and other musical compositions arranged, orchestrated, edited, published, recorded, marketed, and exploited for the benefit of persons submitting such materials to petitioner [R. 1].

At the outset of the case, petitioner attempted to waive trial by jury [R. 17, 25, 29]. The trial court was willing to approve the waiver of jury [R. 29-30]. However, the government refused to consent to waiver of a jury and petitioner was compelled to be tried by a jury against his will [R. 30].

Thereafter, in the course of the trial, the Government in its opening statement to the jury improperly presented and detailed other alleged offenses not mentioned in the indictment and made improper arguments which prejudiced the jury [R. 31-41]. For example, the Government referred to and elaborated upon other alleged offenses involving unrelated persons and entities, namely James Carlyle Berg, Melody Masters, or Royal Melody Masters, Thomas and Berg Company, and Winston Publishing Company [R. 40, 41]. None of these persons or entities was involved in this case and no evidence concerning them or petitioner's connection with them, if any, was submitted in this case. However, the effect of describing other alleged criminal offenses that were not included in the indictment and were not proved, was highly prejudicial to the petitioner, and designed to cause the jury to believe or infer that the petitioner was involved in many criminal offenses.

Furthermore, the Government in its opening statement to the jury persisted in making improper arguments and presenting lengthy details as to alleged facts

and evidence and witnesses to be used, as well as attempting to instruct the jury on the law, all of which were highly improper and prejudicial [R. 32-41].

During the trial, the Government persisted in asking improper leading questions and making improper, misleading and prejudicial remarks (see *infra*). In its rebuttal argument to the jury, the Government improperly argued that a certain partnership agreement constituted a "forgery" [R. 98]. There was no adequate legal proof for such a charge [R. 54-55]. The Government also persisted in arguing its own meaning of the words "made available" in its closing argument [R. 83], despite the fact that the Court had ruled during the trial that there was no ambiguity in the agreement requiring interpretation [R. 48].

The damaging effect of the Government's prejudicial misconduct at the trial was further aggravated by the errors of the trial court. The most serious error of the trial court consisted in its failure to give proper instructions to the jury, particularly in failing to define or set forth the necessary elements of the offense charged. The trial court failed to outline all of the separate elements necessary to constitute fraud in connection with the offense charged, although the court had stated in chambers that it would do so [R. 42-43]. Furthermore, the trial court also gave misleading, inadequate, and erroneous instructions concerning circumstantial evidence [R. 67], presumption of innocence [R. 70, 71], impeachment of a witness who gives false testimony [R. 66], and concerning reasonable doubt [R. 71].

All of these errors were brought to the attention of the Court of Appeals but that Court refused to consider

them because it felt itself bound by Rule 30 of the Federal Rules of Criminal Procedure [R. 27; App. B, p. 2]. However, the application of Rule 52(b) of the Federal Rules of Criminal Procedure (App. B, p. 3) was brought to the attention of the said Court of Appeals but said Court did not give any consideration to Rule 52(b) or even mention its applicability.

Summary of Argument.

I.

The right of an accused to refuse a jury trial existed at early common law and preceded the right to demand a jury trial which developed later. This right continued to be exercised in the American colonies at the time the Constitution was adopted. The framers of the Constitution endeavored to protect the rights of an accused by stating that the accused "shall enjoy the right to trial by jury" (Amendment 6, App. A, p. 1). Since the right to demand includes the right to refuse and since the broad wording "enjoy the right" would include both, there was no reason to specifically detail the alternate choices. It has been recognized that it is the personal privilege of the defendant to demand or refuse a jury, *Patton v. United States*, 281 U. S. 276. Since the accused can waive other constitutional provisions without the consent of the government, there is no reason why the right to trial by jury should depend on government consent.

These constitutional provisions in respect to trial by jury are for the protection of the accused and not the government. There is nothing in the Constitution giving the right to the government to demand a jury trial in a criminal case. It finds its only support in the *obiter dicta* in the *Patton* case which cited no authority

for the proposition. Out of this developed Rule 23(a) of the Federal Rules of Criminal Procedure (App. B, p. 2) which states that the defendant may waive a jury with the approval of the court and the consent of the government. Unfortunately, this gives the government the arbitrary power to compel the accused to have a jury trial against his will. In effect, it gives the government the right to secure a jury trial in a criminal case which right is not granted by the Constitution and which abridges the rights of the accused to exercise his choice. This is contrary to the accused's historical and basic rights, and inconsistent with the concepts of personal liberty. Furthermore, the prosecutor has an adverse interest and can not be a proper guardian to decide for the accused what choice should be made as to a jury trial. Since the accused's right to waive a jury existed long before the Constitution and at the time the Constitution was adopted and since there is nothing in the Constitution giving the Government the right to a jury trial in a criminal case, it is a violation of the Fifth, Sixth, Ninth, and Tenth Amendments to the Constitution to give the Government the right to a jury and to permit the government to veto the right of the accused to waive a jury.

It is the accused's life and liberty that are at stake and he is the one who should decide whether to stand trial by judge or by jury. It is recognized that there are many occasions and situations where the jury would be prejudiced, moved by passion, public feeling, lack of sufficient knowledge, experience, insight, or for some other reason not able to give the accused a fair trial. When the Constitution says that the accused shall "enjoy" the right to trial by jury, it means that the ac-

cused shall have the free exercise thereof and not that he shall be "compelled" to have a jury. What was "given to him as a shield should not be used as a sword."

These provisions were designed to safeguard the liberty and security of the citizen and are to be given a broad and liberal construction with meaning given to all of the words "enjoy the right".

II.

Nowhere in the Constitution is the Government given the right to demand a jury trial in a criminal case. Yet by Rule 23(a) (App. B, 2) the Government, in effect, exercises the right to demand a jury trial and to compel the defendant to undergo a jury trial against his will. We can find no historical, logical or valid legal basis for giving the Government such a right. Since Rule 23(a) operates to abridge the defendant's right to waive a jury trial, it violates his constitutional rights under the Fifth, Sixth, Ninth, and Tenth Amendments (App. A, p. 1).

Rule 23(a) is also invalid because it affects the *substantive rights* of the defendant and because the Court has no power to change the substantive rights of a defendant where it has been given the power to prescribe rules of pleading, practice and procedures, *United States v. Sherwood* (1940), 312 U. S. 584, 591.

III.

The trial court failed to give a complete definition of fraud to the jury and to outline all of the necessary elements of the offenses charged with the result that the jury could not reach an intelligent or proper verdict. The court further gave erroneous and misleading in-

structions concerning circumstantial evidence, impeachment of a witness who gives false testimony, presumption of innocence, and on reasonable doubt. These substantial and serious errors deprived petitioner of a fair trial and violated his constitutional rights under the "due process" clause of the Fifth Amendment.

IV.

The rules of conduct for the Government as prosecutor in a criminal case are set forth in *Berger v. United States*, 295 U. S. 78 at page 88 where the court states that the position of United States attorney as follows: "... and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done."

Unfortunately, during the course of the trial the Government's attorney persisted in asking improper questions and making statements that were improper, misleading and prejudicial so that defendant was deprived of a fair trial.

Furthermore, in his opening statement the prosecutor referred to other alleged offenses not in the indictment, naming and detailing other persons and entities none of which was involved in this case, and no evidence concerning them or petitioner's connection with them, if any, was submitted in this case. The effect was highly prejudicial and caused the jury to believe that petitioner was involved in other criminal offenses. Also, in his opening statement, the prosecutor persisted in making improper arguments, presenting lengthy details as to alleged facts and evidence and witnesses to be used as well as attempting to instruct the jury on the law, all of which were highly improper and prejudicial.

Later, in his opening argument to the jury, the prosecutor referred to matters not in evidence and to some which had been specifically disallowed by the Court. This was highly improper and prejudicial. Then, in his rebuttal argument, the prosecutor argued that a certain document was a "forgery". This charge had not been legally proved and this improper remark constituted prejudicial and reversible error. All of the aforesaid prejudicial misconduct of the Government's attorney was such as to constitute a violation of due process and of petitioner's right to a fair trial.

V.

The petitioner was forced to have a jury because the prosecutor arbitrarily refused to consent to a waiver of jury, although the trial judge indicated his approval. It is well known that there are pitfalls, perils, and dangers in trying any case before a jury and petitioner was thereby compelled to assume these burdens. Since nobody but the prosecutor wanted the jury, his was the solemn duty of insuring that he did not abuse the privilege which he had wrested from the petitioner, and his counsel, of choosing the trier of fact.

Unfortunately, the Government abused the privilege and committed prejudicial error and having caused the conviction of petitioner, sits back and challenges him to pin-point a technically sound and timely objection to each and every error, or succumb. This is exactly the contest which petitioner sought to avoid by waiving a jury; this is exactly what the prosecution had no constitutional right to impose upon the petitioner; this is a classical denial of due process. The admonitions of the court to the jury could not undo their effect on the jury. As the court said, "*You cannot unring a bell*".

Under all the circumstances, we respectfully submit that the court below erred when it failed to consider the application of Rule 52(b) of the Federal Rules of Criminal Procedure (App. B, p. 3) in order to correct the plain errors affecting substantial rights although they were not brought to the attention of the trial court.

It has been held that prejudicial statements made by the prosecuting attorney in his argument to the jury constitute reversible error even though no objection was made at the trial, *Brown v. United States* (9th Cir. 1963), 314 F. 2d 293. Likewise, errors in instructions will be noticed even though no objection was made at the trial, *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664.

None of these authorities is mentioned in the opinion of the court below and there is no discussion whatsoever of Rule 52(b) by the court below. The court below merely referred to the absence of objections by the petitioner as a ground for denying him relief on appeal, citing Rule 30 and the 1955 Brown case which is different from the 1963 Brown case cited by petitioner. Petitioner respectfully urges that under the circumstances it was reversible error for the court below to disregard and to fail to apply Rule 52(b) of the Federal Rules of Criminal Procedure and that the decision of the court below conflicts with the decisions of the Fifth Circuit, the Seventh Circuit, as well as the Ninth Circuit court itself.

ARGUMENT.

I.

Petitioner Was Deprived of His Constitutional and Fundamental Right to Waive a Jury Trial.

Petitioner claims that his fundamental right to *demand* a jury trial in a criminal case includes the right to *refuse* a jury trial and that this basic right can not be abridged by making it dependent upon the consent of the government, for the following reasons:

- (1) **Historically and at the Time of the Adoption of the Constitution, the Right of a Defendant to Waive a Jury Trial Was Recognized.**

It has been established and recognized in the federal courts that a defendant in a criminal proceeding may waive his constitutional right to a trial by jury, *Patton v. United States* (1930), 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263. Furthermore, the defendant has the right to try his own case without a jury even without the benefit of counsel, *Adams v. United States ex rel. McCann*, 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435.

The question here presented is whether the constitutional rights of the petitioner were violated when his request to waive a jury trial was denied because the government refused to consent to such waiver.

It is interesting and important to note that at early English common law the right to *refuse* a jury trial preceded the development of the right to *demand* a jury trial. Yet, even as trial by jury gradually replaced the older methods of proof and became the primary method

of trial in England, the accused still retained the right to be tried by one of the older methods, rather than by jury. However, the Crown preferred to use trial by jury whenever possible, since a conviction by jury resulted in a forfeiture of the accused's property to the Crown, whereas a conviction by one of the other methods of proof did not, *Holdsworth, A History of English Law* 326 (3rd Ed. 1922). Consequently, although the accused retained a free choice as to whether he would be tried by a jury or not, his "consent" to trial by jury was usually coerced by various means including "peine forte et dure", a form of torture.

Despite its original unpopularity, it quickly became clear in England that the jury might afford an excellent means of protecting the subject against oppression by the government, and the jury became one of the Englishman's cherished possessions, *Jenks, The Book of English Law* 97 (1929). Jury trials for criminal offenses came to America with the English settlers, and there is much evidence, especially in the New England States, that an accused was given a choice as to whether he would be tried by the court or a jury; *Griswold, The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 *Va. L. Rev.* 655, 657 (1934).

The case of *Patton v. United States*, 281 U. S. 276, 281-282, cites with approval the references in the brief of government counsel showing that waiver of trial by jury, even in trials for serious offenses, was permitted in the American colonies in colonial times and at the time of the adoption of the Constitution.

(2) **The Right of an Accused in a Criminal Case to Demand a Jury Trial Necessarily Includes the Right to Refuse a Jury Trial.**

As we have heretofore shown, historically this right to waive a jury trial was ancient and recognized and continued during Colonial times, and logically in drawing the Constitution there was no more need or reason to add words recognizing the right to waive a jury than it was necessary to add such words of waiver to any other constitutional right. The right to demand necessarily implies the right to refuse, *People v. Spegal* (Ill. Sup. Ct. 1955), 5 Ill. 2d 211, 218, 125 N. E. 2d 468, 51 A. L. R. 2d 337; *People v. Fisher*, 340 Ill. 250, 257, 172 N. E. 722. As the Court stated in *People v. Spegal*, 5 Ill. 2d 211 at p. 218, "*The power to waive follows the existence of the right, and there is no necessity of guaranteeing the right to waive a jury trial.*" Also, this is the view in the *Patton* case expressed as follows: "*To deny his power to do so, is to convert a privilege into an imperative requirement*", *Patton v. United States*, 281 U. S. 276, 298.

The logic of this view is further expressed in an article by Oppenheim: *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695 at page 702. as follows:

"The constitutional conventions in general had no notions about waiver of jury in criminal cases. If it is true that their sole concern was to prevent the state from denying or abridging that right, it seems manifest that the state does not violate the right when it offers the prisoner a freely exercised option of trial by jury or by judges only." To those defendants who elect the jury, the right remains. It is not denied to those who choose without constraint to give it up."

- (3) Since a Defendant Can Plead Guilty and Waive Any Trial Whatever Without the Consent of the Government, He Must Necessarily Have the Right to Waive a Trial by Jury Without Government Consent.

This proposition is supported by *State ex rel. Warner v. Baer* (1921), 103 Ohio St. 585, 589, which is cited with approval in *Patton v. United States*, 281 U. S. 276 at page 291. In the *Patton* case the court states at pages 296-297 that,

"The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused."

At page 308 in the *Patton* case, the court further states as follows:

"... In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared". . . The view that power to waive a trial by jury in criminal cases should be denied on grounds of public policy must be rejected as unsound."

Patton v. United States, 281 U. S. 276, 308.

Accordingly, there is no logical, historical, or legal reason for restricting the right of the defendant to waive a jury in a criminal case.

Among the courts that have recognized the constitutional right of an accused to waive a trial by jury are the following:

Munsell v. People, 122 Colo. 420, 222 P. 2d 615 (1950);

State v. Hernandez, 46 N. M. 134, 123 P. 2d 387 (1942);

State v. Harvey, 117 Oregon 466, 242 Pac. 440, 444 (1926);

Commonwealth v. Petrillo, 340 Pa. 33, 16 A. 2d 50 (1940);

People v. Scuderi, 363 Ill. 84, 1 N.E. 2d 225, 227 (1936);

State v. Zebrocki, 194 Minn. 346, 260 N.W. 507, 508 (1935);

State ex rel. Warner v. Baer, 103 Ohio State 585, 612 (1921).

- (4) **Since a Defendant Can Waive Other Important Constitutional Rights Without the Consent of the Government, He Must Necessarily Have the Right to Waive a Jury Trial Without the Government Consent.**

It has been held that there is "... nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury ..."

Adams v. United States ex rel. McCann, 317 U. S. 269, 275; *Naples v. United States*, 307 F. 2d 618, 625 626 (D. C. 1962).

The Sixth Amendment states that "the accused shall enjoy" certain procedural rights, including the right to trial by jury. But when a procedure established to protect the accused has provided a threat to the proof of his innocence, his right to waive this procedural

safeguard has been recognized and upheld as much as his right to enjoy it. Justice Frankfurter, delivering the majority opinion in *Adams v. United States ex rel. McCann*, 317 U. S. 269, at 280 (1942), made the importance of this two-fold freedom abundantly clear, as follows:

"When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of the accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution."

Thus, the federal courts have firmly established that the accused's right of "enjoyment" includes his right to waive his carefully guarded constitutional guarantees, including the following:

Waiver of right to public trial:

United States v. Sorrentino, 175 F. 2d 721 (3rd Cir. 1949).

Waiver of right to speedy trial:

Daniels v. U. S., 17 F. 2d 339 (9th Cir. 1927);
Worthington v. U. S., 1 F. 2d 154 (7th Cir. (1924)), cert. den. 266 U. S. 626.

Waiver of right to counsel:

Adams v. U. S. ex rel. McCann, 317 U. S. 269 (1942);
Johnson v. Zerbst, 304 U. S. 458 (1938).

Waiver of right to trial in state and district of the crime:

United States v. Jones, 162 F. 2d 72 (2nd Cir. 1947).

Waiver of right to confrontation of witnesses:

Grove v. U. S., 3 F. 2d 965 (4th Cir. 1925);

Diaz v. U. S., 223 U. S. 442 (1912).

• Waiver of freedom from double jeopardy:

Trono v. U. S., 199 U. S. 521 (1905).

Waiver of privilege against self incrimination:

United States v. Murdock, 284 U. S. 141 (1931).

Waiver of right to grand jury indictment:

United States v. Gill, 55 F. 2d 399 (D. C. N. M. 1931);

Barkman v. Sanford, 162 F. 2d 592 (5th Cir. 1947).

Waiver of right to security from unreasonable searches and seizures:

Poetter v. U. S., 31 F. 2d 438 (9th Cir. 1929).

There is no basis for differentiating a jury trial from public trial or any of the other procedural rights. They are all granted in the same document, many of them in the same Amendment, and the Constitution itself sets up no distinction. They are all personal liberties to be enjoyed by the accused and while the right to a jury trial is an historic one, its tradition should not be used to prevent the accused from deciding for himself when it should be exercised.

In fact the rule has been broadly stated in the case of *Barkman v. Sanford*, 162 F. 2d 592 (5th Cir. 1947) at p. 594, as follows:

"It seems thoroughly established that an intelligent accused may waive any constitutional right that is in the nature of a privilege to him, or that is for his personal protection or benefit."

- (5) **The Constitutional Provisions in Respect to Jury Trials Are for the Protection of the Interests of the Accused and Not the Government; There Is Nothing in the Constitution Giving the Government the Right to Demand a Jury Trial.**

Amendment VI of the United States Constitution provides, in part, as follows: "*. . . the accused shall enjoy the right to . . . trial by an impartial jury . . .*" In the case of *Patton v. United States*, 281 U. S. 276 at page 297, the court states:

" . . . it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused." (Emphasis added).

In the *Patton* case (*supra*) the court states further at page 298, as follows:

"Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement." (Emphasis added).

In construing the Constitution and particularly the Bill of Rights, it must be remembered that they were designed to protect the already existing rights of the people and did not create these rights. They are based upon the concept that the people are endowed with certain inalienable rights which include the rights to "*. . . life, liberty, and the pursuit of happiness . . .*" as set forth in the *Declaration of Independence*, and that these rights existed before the Constitution was written. Among these rights are the rights to enjoy

a jury trial which includes the right to waive a jury trial.

This Court has held that there is "... nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury, even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer". *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275 (1942).

Unfortunately, the well-reasoned opinion of the court in the *Patton* case, *supra*, becomes confused by the *obiter dicta* at the end thereof, where the court added gratuitously that the waiver of jury trial should have the approval of the court and the consent of the government. We respectfully submit that this *obiter dicta* portion of the opinion does not cite any authority and is without any legal or historical basis and is inconsistent with the rest of the opinion. It appears to be an afterthought of caution that the accused shall not waive his right to jury trial without careful consideration. However, the requirement of the consent of the government does not protect the accused. What good is the accused's right to waive a jury trial if the government counsel, who is doing his utmost to convict the accused, can arbitrarily refuse to give his consent and thus thwart the efforts of the accused and his counsel? Does this not "convert a privilege of the accused into an imperative requirement" which the court had stated could not be done?

The whole purpose of these constitutional provisions is to protect the accused, particularly against oppression by the government. It is therefore arbitrary, unreasonable, and a deprivation of the accused's constitu-

tional rights to compel him to have a jury trial against his wishes, just because the government arbitrarily and without reason insists upon it. As the court, through Justice Frankfurter stated in *Adams v. United States ex rel. McCann*, 317 U. S. 269 at page 279: "What were contrived as protection for the accused should not be turned into fetters." (Emphasis added).

To require the consent of the Government before defendant can waive a jury trial in effect destroys the defendant's right and gives the Government a right to demand a jury trial. To give the Government a right to demand a jury trial in criminal cases, is contrary to our Constitution, contrary to legal history, and a clear violation of the basic rights of an accused. This principle is supported in the case of *People v. Spegal*, 5 Ill. 2d 211, where the court states at page 218, as follows:

"... that the prosecution's consent is necessary to make such a waiver effective is inconsistent with the defendant's acknowledged power, enables the state to nullify his act and reduces his power to waive a jury trial to a shadow . . . The power to waive follows the existence of the right and there is no necessity of guaranteeing the right to waive a jury trial."

The case of *People v. Spegal* (*supra*) overrules *People v. Scornavache*, 347 Ill. 403, which was contrary. A sharp criticism of the *Scornavache* case and arguments for the unfettered right of an accused to waive a jury trial are set forth in an article by Jerome Hall in 18 *Am. Bar Assn. Journal*, 226, entitled "Has the State a Right to Trial by Jury in Criminal Cases".

The American Law Institute has acknowledged and provided for the right of the defendant to waive trial by jury in a criminal case, *American Law Institute: Code of Criminal Procedure*; Section 266 (1930), as follows:

"In all cases except where a sentence of death may be imposed trial by jury may be waived by the defendant. Such waiver shall be made in open court and entered of record."

Various writers have supported the view that the decision whether trial is to be by jury or before the court should rest with an accused, including the following:

Orfield: *Criminal Procedure from Arrest to Appeal*, 393 (1947)

Grant: *Waiver of Jury Trials in Felony Cases*, 20 Calif. L. Rev. 132, 161 (1932)

Oppenheim: *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695, 702 (1927)

Jerome Hall: *Has the State a Right to Trial by Jury in Criminal Cases*, 18 Am. Bar Assn. Journal 226

Griswold: *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655 (1934)

Furthermore, it has been held in the federal court that where right to a jury trial exists in petty offenses, the consent of the Government is not necessary to effect a waiver, *United States v. Au Young* (1946), 142 Fed. Supp. 666. We submit that there is all the more reason to recognize the defendant's right to waive a jury trial in more serious offenses.

Since there is nothing in the Constitution giving the government a right to a jury trial in a criminal case and in view of the matters herein set forth, we respectfully submit that any attempt to give a right, directly or indirectly to the government to secure a jury trial in a criminal case and any attempt to abridge the petitioner's right to waive a jury trial, is in violation of petitioner's rights under *Amendments 9 and 10* of the Constitution (Appendix A, pp. 1).

The rights granted to the government under the Constitution are derived from the people; any attempt to abridge the rights retained by the people would amount to an unconstitutional limitation of their inherent rights, including the inherent right to choose between trial by jury or by the court alone.

In construing and applying *Amendment 9* to this case, the fact that the framers of the Constitution did not deem it necessary to state that an accused could also waive his right to a jury, would not disparage such right. Every accused had an inalienable right to demand or refuse trial by jury before the adoption of the Constitution. Therefore, the failure to specify such right does not abrogate such right. In fact, it is significant that the Constitution speaks only of "enjoyment" of certain rights and not of "waiver". They were well aware of the fact that the right to demand includes the right to refuse.

Furthermore, *Amendment 10* of the Constitution specifies that all rights are reserved to the people except such as were specifically delegated to the United States or to the States.

Thus, it is clear that the Government has no constitutional right to demand a jury trial in a criminal case

or to deprive petitioner of his right to waive a jury trial.

(6) The Accused Has a Right to Safeguard Himself Against Oppression or Partiality of a Jury and to Decide What Is Best for Himself.

We must at all times remember that it is the accused's life and liberty that are at stake. It is recognized that there are occasions when a jury might be influenced by passion, prejudice, or public feeling, or lack sufficient knowledge, experience, or insight to give the defendant a fair trial. Often, the subject matter may be too technical or too involved for a jury. This has been aptly expressed as follows:

"Clearly this right is for the benefit of the accused. If he regards it in the particular case as a burden, a hardship, a prejudice to a fair trial, why in the name of reason should he not be permitted to waive it and submit his cause to the magistrate. The local atmosphere with which the jurors are more or less impregnated may not in his judgment have reached the magistrate. He may have the highest confidence in his sense of fairness and justice in determining the facts of his cause, and what was given to him generally as a shield, should not be used as a sword in case he feels that a jury trial in such case would so result." Hoffman v. State, 98 Ohio St. 137, 146-147 (1918) (Emphasis added).

The constitutional provision states that ". . . the accused shall enjoy the right to . . . trial, by . . . jury . . ." [Amendment 6, (App. A, p. 1)]. To "enjoy" the right means to have the free, voluntary and unrestricted use of it and the right to determine when it

shall be exercised. It does not mean to be *compelled* to exercise the right. Consequently, if an accused is *compelled* to have a jury trial, he no longer "enjoys" the right. This thought is expressed in the following opinion:

"The right of an accused person to a jury trial is absolute to the extent that he may have such a trial by claiming it or even by withholding his consent to proceed without it. The State owes to a person charged with a crime a fair and impartial trial, including a strict compliance with every constitutional guaranty, but it is not obliged to force upon him the acceptance of rights and privileges in the face of his desire, informed and expressed, to waive them." *People v. Fisher*, 340 Ill. 250, 257, 172 N. E. 722 (1930) (Emphasis added).

The basic question is: should not the defendant himself have the right to make the ultimate decision as to demand or waiver of jury trial. This view is held by Justice Frankfurter who stated the following in *Adams v. United States ex rel. McCann*, 317 U. S. 269 at p. 241:

"... and since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury",

and at page 242, the court goes on to state: *"What were contrived as protections for the accused should not be turned into fetters."* In that case, the defendant did not even have counsel when he waived the jury. Certainly, this principle should apply all the more where

the accused through capable counsel requests a waiver of jury trial.

In the instant case, the Government arbitrarily refused to consent to a waiver of jury trial, without giving any reason, although the defendant requested the waiver and although the trial court indicated its approval. It appears to be most unjust and contrary to the entire concept of personal liberty. Certainly, the Government should not be the one to determine whether the best interests of the accused would be served by a judge or a jury. The prosecutor has an adverse interest and can not properly act as guardian of the rights of an accused. We respectfully submit that the arbitrary conduct of the Government in this regard is contrary to the standard set forth in the case of *Viereck v. United States*, 318 U. S. 236 (1943), where the court states at page 248, as follows:

"The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. . . . While he may strike hard blows, he is not at liberty to strike foul ones."

(7) To Compel a Defendant in a Criminal Case to Undergo a Jury Trial Against His Will Is Contrary to His Right to a Fair Trial and the Provisions of the Constitution.

The Fifth Amendment to the Constitution (App. A, p. 1) provides, in part, as follows:

"No person . . . shall be deprived of life, liberty, or property, without due process of law."

It is our contention that where the defendant is compelled to undergo a jury trial against his will and against the will of his counsel, when the trial judge has expressed his approval of their decision to waive a jury trial, and only because the government refused to consent thereto, there is a violation of the "due process clause" of the Fifth Amendment as well as of other constitutional provisions.

This provision protects the right of a defendant to a fair hearing, *Wong Yang Sung v. McGrath*, 339 U. S. 33, 50. It supplements the procedural guarantees in the Sixth Amendment and in the preceding clauses of the Fifth Amendment for the protection of persons accused of crime, *Constitution of the United States*, Senate Document No. 170 (1953 Ed.), p. 847.

The case of *Gideon v. Wainwright*, 372 U. S. 335, 339, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), emphasizes that, ". . . due process is a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," and that the due process clause relates to the concept of the accused having a fair trial and the protection of the fundamental rights of an accused. It is further held that due process, ". . . in safeguarding the liberty

of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice, which lie at the base of our civil and political institutions," *Mooney v. Holohan*, 294 U. S. 103, 112 (emphasis added).

Therefore, in applying the test of due process to this case, we submit that since the petitioner had a right to waive a jury trial, it became a mockery to make this right dependent upon the consent of the government, and his constitutional rights were thereby violated.

(8) The United States Constitution and Particularly the Bill of Rights Provisions Thereof Are to Be Liberally Construed in Favor of the Accused.

It is a fundamental rule of construction that the Constitution should receive a liberal interpretation in favor of a citizen especially with respect to those provisions which were designed to safeguard the liberty and security of the citizen, *Byars v. United States*, 273 U. S. 28, 32; *Sgro v. United States*, 287 U. S. 206, 210; *Boyd v. U. S.*, 116 U. S. 616, 635; *Ex Parte Lange*, 85 U. S. 163, 178.

It has been held that in the construction of the Constitution real effect must be given to *all* of the words it uses, *Myers v. United States*, 272 U. S. 52, 151, and that words employed in the Federal Constitution cannot be regarded as meaningless, *Wright v. United States*, 302 U. S. 583, 588.

It has further been held that the constitutional provisions concerning the enjoyment of a right under the Sixth Amendment shall be given a broad and liberal construction in the federal courts, *Gall v. Brady* (D.C.

Md. 1941), 39 Fed. Supp. 504, 513; *Johnson v. Zerbst*, 304 U. S. 458, 462, 463.

Therefore, in construing the provision of the Sixth Amendment whereby "... the accused shall enjoy the right to a trial by jury", the court should recognize the accused's right to refuse a jury trial. Furthermore, the expression "... shall *enjoy* the right" (emphasis added) means that the accused shall have the free, uninhibited and voluntary right to choose a jury trial without any compulsion. Obviously, if the accused is *compelled* to have a jury trial against his will, he is not "*enjoying*" his right to a jury trial.

We, therefore, respectfully submit that an accused has the fundamental right to *refuse* a jury trial as well as the right to *demand* a jury trial, and that there was no intention by the framers of the Constitution to limit his rights in that regard.

II.

Rule 23(a) of the Federal Rules of Criminal Procedure Is Constitutionally Invalid Particularly Insofar as It Limits the Right of the Defendant to Waive a Trial by Jury by Requiring the Consent of the Government Thereto.

Nowhere in the Constitution is the Government given the right to demand a jury trial in a criminal case. Yet by Rule 23(a) the Government, in effect, exercises the right to demand a jury trial and to compel the defendant to undergo a jury trial against his will. We can find no historical, legal, logical or valid basis for giving the Government such a right. Since Rule 23(a) operates to abridge the defendant's right to waive a jury trial, it violates his constitutional rights under the Fifth,

Sixth, Ninth, and Tenth Amendments heretofore cited, (App. A., p. 1).

The learned opinion of the Court of Appeals in this case, *Singer v. U. S.*, 326 F. 2d 132, 133 acknowledges that petitioner's "logic is not lacking some persuasive quality" in urging the unconstitutionality of Rule 23(a) against him. The admitted logic of appellant's position is then said to yield to "well settled" authority exemplified by three cited cases. Careful analysis of each of these cases discloses that none of them settles this highly important constitutional issue well, or at all. *Patton v. United States* (1930), 281 U. S. 276, the only decision of higher authority cited in the Court's learned opinion or by the government in support of Rule 23(a), was a case in which the government stipulated with the defense that a felony trial should continue with eleven instead of the original twelve jurors. The stipulated jury of eleven convicted the defendant, and the United States Supreme Court affirmed. As a matter of fact, the opinion in the *Patton* case comprehensively supports the arguments in favor of petitioner's right to waive a jury trial. The only portion adverse is the *obiter dicta* at the end of its opinion which cites no authority and had no valid basis and does not settle the issues before this Court.

Taylor v. United States (9th Cir. 1944), 142 F. 2d 808, cert. den., 323 U. S. 723, reh. den. 323 U. S. 813, the second authority cited by the Court in support of Rule 23(a) is another case in which the government stipulated with the defendant to continue trial with eleven jurors. The right of a defendant to waive the jury entirely, with the approval of the trial judge, over

the government's objection was neither involved in the *Taylor* case, nor decided by it.

Mason v. United States. (10th Cir. 1957), 250 F. 2d 704, the third and last decision cited in the learned opinion, was a case in which the trial *judge*, and not the prosecutor, insisted upon trial by jury, and refused to approve the defendant's election to be tried by the Court alone. The prosecutor's consent or refusal was never put in issue; the government's position in the matter is not even mentioned in the opinion; and, accordingly, the point with which we are concerned was in no wise involved or decided.

Thus, of the three cases cited by the learned Court in the case at bar, two involve a stipulation by prosecution and defense to a jury trial of eleven, and one involves a refusal by the trial *judge* to approve a non-jury trial. None of the three cases cited involves or decides that the government may constitutionally force (1) the defendant, (2) his counsel and (3) the trial court to bow in unison to the will, whim or motive, whatever it might be, of the prosecutor in choosing or waiving a jury, as was done here.

Writers on the law, who have considered the point, have denounced the Rule 23(a) requirement of consent by the prosecutor as procedurally unconstitutional:

"While the rule requires the consent of the Government to a waiver of a jury trial, as far as the author is aware, the Government has ordinarily considered giving such consent a pro forma routine matter and has generally granted it as of course, without discussion. Obviously the prosecution should be interested only in seeing that justice is

done, and should have no interest in the choice of the mode of trial. *A prosecuting attorney should not be a partisan advocate representing a client.* He is an officer whose function is to assist in attaining a just result, whether it be a conviction or an acquittal. Many years ago an eminent Solicitor General of the United States^{*} observed that 'the Government always wins a case when justice is done to one of its citizens.'

"After all the right to trial by jury is a constitutional right of the defendant alone. It is intended to be a privilege of the accused. The prosecution has no constitutional right to a trial by jury and the requirement that it give its consent to a waiver is a purely procedural rule and has always been regarded as such.

"The author urges that Rule 23(a) of the Federal Rules of Criminal Procedure be amended by striking out the requirement of a consent of the Government to a waiver of a jury trial."

"A Criminal Case in the Federal Courts" by Alexander Holzoff, cited in the West Publishing Co. edition of the 1960 Federal Rules of Criminal Procedure, pp. 17-18. (Emphasis added).*

Another writer puts the matter this way:

"Author's Note to Rule 23: This [Rule 23(a)] appears to state the present law with respect to the right to trial by jury in criminal cases. I

^{*}The author is a United States District Judge for the District of Columbia and former Chairman of the Section of Judicial Administration of the American Bar Association.

could never understand why a defendant should be required to secure the consent of the court and the prosecutor. The effect of this rule is that either the court or the prosecutor can force a jury on him when he does not want it. There is an argument in favor of the court where the death penalty is involved and the court prefers to be excused, but that is subject to debate. In cases involving public passions and prejudices a judge is in danger of an unpopular decision. All of these matters occur to me in considering the position of the judge, but where is the prosecutor entitled to vote? He will insist on a jury when he believes that the prosecution will have an advantage. I never heard of the battle in which the prosecutor won the right to a jury trial."

Federal Rules of Criminal Procedure by Wm. Scott Stewart; copyright 1945; Publisher: The Flood Company, Chicago, Ill.

The federal courts have the power as well as the duty to declare invalid federal rules of procedure which are unconstitutional and should do so in this case.

Rule 23(a) is also invalid on another ground. Although the Supreme Court has been given the power to prescribe rules of pleading, practice, and procedure, it has no power to change the *substantive rights* of a defendant, *Baker v. United States* (1944), 139 F. 2d 721 (C. C. A. 8th); *Mississippi Publishing Corp. v. Murphree* (1946), 326 U. S. 438; *United States v. Sherwood* (1940), 312 U. S. 584.

This principle is set forth in *Federal Criminal Practice Under the Federal Rules of Criminal Procedure*, by William M. Whitman at page 6, as follows:

"However, the (Federal Rules of Criminal Procedure) govern practice and procedure only; the authority of the Supreme Court to prescribe rules of procedure does not empower the court by a procedural rule to deprive a person of a substantive right granted by law."

* We respectfully submit that the right to waive a jury trial in a criminal case is a substantive right which can not be abridged by rule of court.

III.

Petitioner Was Denied a Fair Trial as Guaranteed Under the Fifth Amendment in That His Conviction Rests Upon Instructions to the Jury Which Were Incorrect, Inadequate, Misleading and Prejudicial and in the Failure of the Jury to Receive Other Necessary and Proper Instructions.

The due process clause of the *Fifth Amendment* (App. A, p. 1) relates to the concept of the accused having a fair trial and to the protection of the fundamental rights of an accused, *Gideon v. Wainwright*, 372 U. S. 335, 339, and it is our contention that the learned trial court committed such serious errors in its instructions to the jury that the defendant was thereby deprived of a fair trial.

In considering the instructions to be given to the jury, the trial court stated in chambers that in instructing the jury, the court would rely upon the elements of fraud set out in the cases of *Southern Development v. Silva*, 125 U. S. 247 and *Oppenheimer v. Clunie*,

142 Cal. 313, 318 [R. 42-43]. Nevertheless, the trial court in giving its instructions to the jury failed to give an adequate or complete definition of fraud [R. 67-69]. This was clearly error, *Bird v. U. S.*, 180 U. S. 356. It was basic and all-important that the jury should know and understand all of the separate elements necessary to constitute fraud and to evaluate each one in connection with the offenses charged. The court failed to outline to the jury the following elements required to prove fraud:

- (a) That the defendant has made a representation in regard to a material fact.
- (b) That such representation was false.
- (c) That such representation was not actually believed by defendant on reasonable grounds to be true.
- (d) That it was made with intent to be acted upon.
- (e) That the complainant relied on such representation.
- (f) That in so acting, the complainant was ignorant of its falsity, and reasonably believed it to be true.

The court further erred in its instructions concerning circumstantial evidence. In instructing the jury on the weight and effect of circumstantial evidence in the case at bar, the trial court stated: "*If the circumstantial evidence measures up to all the foregoing requirements, it is the duty of the jury to return a verdict of guilty*" [R. 67] (emphasis added).

This was misleading, erroneous, and prejudicial since not only the *circumstantial evidence* but *all of the evidence* must measure up to the requirements to show guilt beyond a reasonable doubt as well as meet the

other requirements mentioned by the event, *Fry v. Sheedy* (1956), 143 Cal. App. 2d 615, 677, 300 P. 2d 242. It is reversible error to instruct the jury that it is their duty to bring in a verdict of guilty. It was further prejudicial error to give circumstantial evidence more weight or even the same weight as direct evidence, 53 Am. Jur. 573; *State v. Alliance*, 330 Mo. 773, 51 S. W. 2d 51, 85 A. L. R. 471; *Lewis v. Franklin* (1958), 161 Cal. App. 2d 177, 185, 326 P. 2d 625.

The trial court's instruction concerning the impeachment of a witness who gives false testimony, that all of the testimony of such a witness *must be rejected* when he has testified falsely [R. 66] is erroneous since the rule still permits a juror to *accept* other testimony of a witness who has willfully sworn falsely regarding a material fact, if, in spite of merited suspicion on the part of the juror, *he still believes* the balance of the testimony to be true, *People v. Kennedy* (1937), 21 Cal. App. 2d 185, 201, 69 P. 2d 224. It has been held that it would be an invasion of the province of the jury to instruct them that they "must" or "should" disregard the testimony of a witness testifying falsely, 53 Am. Jur. 583 note 1; *Com. v. Ieradi*, 216 Pa. 87, 64 Atl. 889. It has also been held that this instruction should not be given as a matter of course in any case but only where the trial judge suspects that there has been a willful false swearing done in the case; nor even then, if the judge feels that the jury would be warranted by the evidence in coming to a different conclusion as to such testimony, 53 Am. Jur. 582 Notes 3, 6, 7; *State v. Hickam*, 95 Mo. 323, 8 S. W. 252; *Jarrrell v. Com.*, 132 Va. 551, 110 S. E. 430. We respectfully submit that the evidence in this case did not warrant said instruction.

In instructing the jury on the presumption of innocence [R. 70-71], the court's instructions were inadequate and misleading. The court should have instructed the jury that the presumption of innocence continues with the defendant throughout the trial and the deliberations of the jury. *People v. Hardwick*, 204 Cal. 582, 269 Pac. 427.

Furthermore, in instructing on "reasonable doubt", the trial court set a lower standard than is required when it stated as follows:

"But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of a defendant's guilt, *such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt*" [R. 71] (emphasis added).

This instruction was inadequate and misleading. The rule has been set forth in the case of *Miles v. U. S.*, 103 U. S. 304, 309, where the court holds that in order to exclude reasonable doubt there must be a conviction which would involve *matters of highest concern and most important interests, under circumstances where there is no compulsion upon them to act at all.*

The court is required to define terms having a technical meaning in the law and the court's failure to define the elements of the offense constitute reversible error, *Lucas v. Michigan C. R. Co.*, 98 Mich. 1, 56 N. W. 1039; *State v. Terrell*, 55 Utah 314, 324, 186 Pac. 108, 25 A. L. R. 497; *Fry v. Shcedy* (1956), 143 Cal. App. 2d 615, 627; 300 P. 2d 242; *Lewis v. Franklin* (1958), 161 Cal. App. 2d 177, 185, 326 P. 2d 625.

In regard to the failure of the court to give necessary and proper instructions, there is the rule that the defendant is entitled to instructions defining the law applicable to his theory of the case covering his defense, if there is any competent evidence reasonably tending to substantiate that theory, *Little v. U. S.* (C. C. A. 10th), 73 F. 2d 861, 867; *People v. Dole*, 122 Cal. 486, 55 Pac. 581. For example, it has been held that an honest belief in the representations being made is a good defense, *Rudd v. U. S.* (C. C. A. 6th), 173 Fed. 912.

We respectfully submit that the foregoing constituted a violation of petitioner's constitutional rights under the due process clause of the Fifth Amendment.

IV.

Petitioner Was Denied a Fair Trial as Guaranteed by the Constitution by Reason of the Improper and Prejudicial Statements, Arguments and Conduct of the Government.

It is reversible error for the prosecutor in his opening statement to refer to incompetent or irrelevant matters especially if they are prejudicial, *State v. Peters*, 82 R. I. 292, 107 A. 2d 428, 48 A. L. R. 2d 999; *People v. Fleming*, 166 Cal. 357, 379, 136 Pac. 291.

The Government's attorney in his opening statement referred to other alleged offenses involving other persons and entities to wit, James Carlyle Berg, Melody Masters or Royal Melody Masters, Thomas and Berg Company, and Winston Publishing Company [R. 40, 41]. None of these persons or entities was involved in this case and no evidence concerning them or the petitioner's connection with them was submitted in this case. However, the effect of setting forth other al-

leged criminal offenses that were not included in the indictment and were not proved, was highly prejudicial to the petitioner and caused the jury to believe that the petitioner was involved in many other alleged criminal offenses.

Furthermore, the prosecutor in his opening statement to the jury persisted in making improper arguments and presenting lengthy details as to alleged facts and evidence and witnesses to be used as well as attempting to instruct the jury on the law, all of which were highly improper and prejudicial [R. 32-41]. For example, he states to the jury: "But once you have considered all this, you can't go back to the original state you are in right now." [R. 33]; "This is the key thing. The Mad Hatters want to record" [R. 33]. Then the following: "(Mr. Thornton) Would you have bought, if you were the amateur songwriter, if you had known all of that information . . . Mr. Campbell: Just a minute. I object to the argument.

"The Court: That goes beyond an opening statement. You are now arguing your case. Just state what you are going to prove" [R. 36].

It has been held that it is improper to use the opening statement to embody or convey proof by means of unsworn facts or to argue facts or to discuss the law of the case, 53 *Am. Jur.* 358; *Scripps v. Reilly*, 35 Mich. 371; *Wells v. Ann Arbor R. Co.*, 184 Mich. 1, 150 N. W. 340.

During the course of the trial, the government's attorney persisted in asking improper questions and making statements which were improper, misleading and prejudicial so that petitioner was deprived of a fair trial [R. 52-53, 54, 57, 58, 61, 63-64].

The persistence of this conduct on the part of the prosecutor provoked the following comments by the trial court:

" . . . The objection is sustained. The jury are instructed to disregard questions and not to imply what the answer might be if it had been given. As I warned you before there is always a danger. Someone once said '*You cannot unring a bell*' and that is true." [R. 58]. (Emphasis added).

The standard of conduct and the duties imposed upon the prosecutor in a criminal case are set forth in *Viereck v. United States*, 318 U. S. 236, 248, 63 S. Ct. 561 (1943) where the court held that the appeal to passion and prejudice by the prosecuting attorney in his closing argument was " . . . offensive to the dignity and good order with which all proceedings in court should be conducted" (p. 248). The court goes on to state the rule as follows at page 248:

"We think that the trial judge should have stopped counsel's discourse without waiting for an objection. The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as

much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one! *Berger v. United States*, 295 U. S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 314. Compare *New York Central R. Co. v. Johnson*, 279 U. S. 310, 316, 318, 49 S. Ct. 300, 302, 303, 73 L. Ed. 706."

It has been held that it is improper and prejudicial for the prosecutor to ask a question to which he expects a negative answer and then fail to offer evidence in support of his contention, *People v. Perez*, 23 Cal. Rptr. 569, 574, 575, 373 P. 2d 617 where the court states at page 575:

"The jury have a right to believe that the District Attorney is in good faith and probably had a hidden source of information."

It is improper and prejudicial for the prosecutor to make statements of alleged fact in the guise of questions propounded to witnesses; *Berger v. United States*, 295 U. S. 78, 79 L. Ed. 1314, 55 S. Ct. 629.

The conduct of the prosecuting attorney during the course of the trial provoked the trial court to state the following:

"The Court: I have warned the jury to disregard it. Counsel doesn't know the rules of evidence. I think between now and the next case he ought to do a little homework and learn the rules of evidence in criminal cases. I am sincere, and I think it is my duty to warn the jury, because you are doing a lot of things that shouldn't be done by a prosecutor. You make statements of what you intend to prove when I have sustained the objection, which is wrong". [R. 61].

In his opening argument to the jury, the prosecutor referred to matters not in evidence, and to some matters which had been specifically disallowed by the court [R. 82-83, 90]. This was highly improper, *Scripps v. Reilly*, 35 Mich. 371, 387; *Wells v. Ann Arbor R. Co.*, 184 Mich. 1, 150 N. W. 340, 344.

Further, the prosecutor improperly argued that the jury *must* draw certain inferences which he wanted them to draw [R. 95]. The prosecutor continued his tactics of trying to read into the oral and written evidence his own terms and conditions, interpretations, meanings and innuendoes, and to have the jury infer wrongful and sinister meanings in every word and act [R. 83, 85, 87, 88, 89, 90, 94]. Likewise, the prosecutor persisted in arguing matters which had been ruled out by the court, all of which were highly prejudicial and which necessarily influenced the jury. For example, he argued about the meaning of "made available" although the court had ruled there was no ambiguity [R. 88, 48]. Another example is shown where the prosecutor argued both in his opening statement and in his opening argument that petitioner had an interest in Eagle Pass Music Publications despite the fact that the entire ownership was shown to be otherwise [R. 40, 52, 53, 54, 88, 94].

In his rebuttal argument to the jury, the government's attorney made improper and prejudicial remarks. He argued that one of the documents was a "forgery" and he argued to the jury, "That isn't so, that is a forgery" [R. 98]. There was no legal proof for such a charge [R. 54-55]. This argument was highly improper and prejudicial and constituted reversible error, *Viereck v. United States*, 318 U. S. 236.

We respectfully submit that the prejudicial misconduct of the Government's attorney was such as to constitute a violation of due process and of petitioner's right to a fair trial.

V.

The Learned Court Below Erred in Failing to Apply Rule 52(b) of the Federal Rules of Criminal Procedure in Order to Correct the Manifest and Seriously Prejudicial Errors Which Occurred at the Trial Even Though They Were Not Called to the Attention of the Trial Court.

The pitfalls, perils and dangers of trying any case before a jury are well-known to every trial lawyer, judge and justice. Trial by jury differs not merely in degree but in kind from trial by the court alone.

"The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure—these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury." *Adams v. United States ex rel., McCann* (1942), 317 U. S. 269, 278.

The petitioner here and his trial counsel, with the approval of the trial judge, chose a court trial; but the prosecutor decided that the case should be tried before a jury. To say the least, this unconstitutional arroga-

tion of power by the prosecutor carried with it a high and grave duty of scrupulous regard on his part for the niceties of procedural fair play. Since nobody but the prosecutor wanted the jury, his was the solemn duty of insuring that he did not abuse the privilege which he had wrested from the petitioner, and his counsel, of choosing the trier of fact.

The opinion of the court below refers to "situations where government counsel may have been guilty of improper examination or argument in the presence of the jury" as well as "numerous examples of alleged misconduct on the part of government counsel" [R. 26], and "alleged failure by the court to give adequate instructions on the elements of criminal fraud" [R. 27]. However, the response of the court below to these specifications of obvious prejudicial error, which cannot be made to disappear simply by denying their existence, is that (1) the petitioner failed to make timely objections, and (2) that the jury was duly admonished.

However, the need to make timely, pointed, legally sound and valid objections to prejudicial misconduct before the jury was thrust upon the petitioner against his will by the prosecutor himself. The petitioner did not ask for the jury and he did not invite or commit the prejudicial error with which the record abounds. Having forced the jury upon the petitioner, the prosecution then indulges in an opening recitation of other alleged offenses which were entirely extraneous and unproven, accused the petitioner in his closing argument of "forgery" with which he was not charged and which was unproven, admittedly failed to present an adequate instruction on mail fraud to the trial judge who accordingly did not define for the jury the elements of

the crime, and generally played upon the passions and prejudices of the jury. Now the prosecution sits back after the petitioner has been convicted and challenges him to pinpoint a technically sound and timely objection to each and every error, or succumb. This is exactly the contest which the petitioner sought to avoid by waiving a jury; this is exactly what the prosecution had no constitutional right to impose upon the petitioner; this is a classical denial of due process.

The second response to petitioner's specifications of prejudicial error is that the trial judge duly admonished the jury. Aside from the point that petitioner constitutionally attempted, with the approval of the trial judge, to avoid a trial by jury, where admonitions would not be at all necessary, it is crystal clear that judicial admonitions are no match for the subtle and hidden but immensely powerful forces of mass psychology. These forces can no more be controlled by admonitions than could the sea by King Canute. These forces were called into play, and played upon with error, by the prosecution over the constitutional objection of the defense. This was a denial of due process beyond the corrective reach of any admonition.

The learned court below failed to consider the application of Rule 52(b) of the Federal Rules of Criminal Procedure which provides that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court" (App. B, p. 3).

It has been held that prejudicial statements made by the prosecuting attorney in his argument to the jury constitute reversible error even though no objection was made at the trial, *Brown v. United States* (9th

Cir. 1963), 314 F. 2d 293; *Ginsberg v. United States* (5th Cir. 1958), 257 F. 2d 950; *Wagner v. United States* (5th Cir. 1959), 263 F. 2d 877. Likewise, errors in instructions will be noticed even though no objection was made at the trial, *United States v. Raub* (7th Cir. 1949), 177 F. 2d 312, *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664.

None of these authorities is mentioned in the opinion of the court below and there is no discussion whatsoever of Rule 52(b) by the court below. The court below merely referred to the absence of objections by the petitioner as a ground for denying him relief on appeal, citing Rule 30 and the 1955 *Brown* case.*

In view of the foregoing, it would appear that there is a conflict between the decision of the Court of Appeals in the case at bar and those decisions of other circuit courts cited above, including prior decisions of said Ninth Circuit Court itself concerning the application of Rule 52(b). However, the cases cited by petitioner which invoke Rule 52(b) clearly entitle him at the very least to a careful consideration of its applicable effect here. Thus, in *Herzog v. United States* (9th Cir. 1956), 235 F. 2d 664 at 666 this court said:

"Criminal Rule 30 by its terms precludes a party from assigning as error the giving of an instruction to which he has not objected on the trial. Rule 52(b), appearing under the caption 'General Provisions,' is not directed to the party, but is a grant of authority to the court itself. These rules

*The case of *Brown v. United States* (9th Cir. 1955), 222 F. 2d 293 cited in the Court's opinion is a different case from *Brown v. United States* (9th Cir. 1963), 314 F. 2d 293 cited by petitioner.

are not conflicting. Rather, they complement each other. Rule 52(b) was doubtless designed to take care of unusual or extraordinary situations where, to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings, the courts are broadly empowered to notice error of their own motion. The Rule is in the nature of an anchor to windward. It is a species of safety provision the precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges.

"Subsequent to the adoption of the criminal rules many of the circuits have noticed asserted error in instructions not objected to below. See cases cited in the footnote."

In *United States v. Raub* (7th Cir. 1949), 177 F. 2d 312, where a conviction for income tax evasion was reversed for improper instructions, the Court of Appeals said at page 315:

"It appears to be generally established now that— Rule 30 notwithstanding, in criminal cases involving life or liberty of a defendant, an appellate court may notice plain and seriously prejudicial error in the instructions, even though it was not called to the attention of the trial court."

In *Ginsberg v. United States* (5th Cir. 1958), 257 F. 2d 950 at page 955 the court stated:

"... authority is not wanting for enforcement of the fundamental rules of fairness even when no exception is taken to the argument.

"We hold that this statement of the prosecuting attorney constituted 'plain errors . . . affecting substantial rights' under Rule 52(b), 18 U.S.C.A., governing criminal procedure. It was such an error, also, as would have been magnified in its influence on the jury by an objection and motion for mistrial. It made it so unlikely that the petitioner could be given a fair trial, as the term is understood in our jurisprudence, that we hold it to be reversible error."

Petitioner respectfully and sincerely urges that under all of the circumstances it was reversible error for the court below to disregard and to fail to apply Rule 52(b) of the Federal Rules of Criminal Procedure and that, in any event, there is a conflict in the decision of the court below concerning Rule 52(b) with the decisions of the Fifth Circuit and Seventh Circuit as well as the Ninth Circuit Court itself, which should be resolved by this court.

Conclusion.

For the reasons hereinabove stated, it is respectfully submitted that the judgment of the court below should be reversed with directions to the Trial Court to dismiss the charges.

Respectfully submitted,

SIDNEY DORFMAN,

Attorney for Petitioner.

APPENDIX A.

United States Constitutional Provisions.

Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and case of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 9.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX B.

Federal Rules of Criminal Procedure.

Rule 23. *Trial by Jury or by the Court*

(a) *Trial by Jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) *Jury of Less Than Twelve.* Juries shall be of 12 but at any time before verdict the parties may stipulated in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) *Trial without a Jury.* In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objec-

tion. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. *Harmless Error and Plain Error.*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX C.

Federal Statute.

18 U. S. C. Section 1341

“Fraud and swindles

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both . . .”

**Affidavit of Service of Brief for the Petitioner
Pursuant to Rule 33.**

State of California, County of Los Angeles—ss.

Viola Figg, being first duly sworn, deposes and says:

That this affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for Sidney Dorfman, Esq., who is the attorney for Mortimer Singer, Petitioner in this action; that this affiant is of the firm of Parker & Sons, Inc., 241 East Fourth Street, Los Angeles, California, who are the printers and agents in this matter for said attorney, and have their offices at said address in the City of Los Angeles, State of California.

That on the 9th day of Sept., 1964, affiant served the within Brief for the Petitioner on the United States of America, respondent herein, by placing true copies thereof in an envelope, with postage prepaid, addressed to the office address of its attorney of record as follows: Francis C. Whelan and Timothy M. Thornton, United States Attorney for the Southern District of California at Room 600 Federal Building, Los Angeles, California, and by placing true copies thereof in a duly addressed envelope, with *air mail postage prepaid*, to the following address:

Solicitor General,
Department of Justice,
Washington 25, D.C.,

and by then sealing said respective envelopes and depositing the same, with the postage thereon fully prepaid as aforesaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

VIOLA FIGG

Subscribed and sworn to before me this 9th day of September, 1964.

MARGARET H. FALES

*Notary Public in and for the County
of Los Angeles, State of California.*

My Commission Expires January 11, 1966.